

ORIGINAL



0000139553

RECEIVED

BEFORE THE ARIZONA CORPORATION COMMISSION

2012 SEP 17 P 1:02

DOCKETED

SEP 17 2012

COMMISSIONERS

GARY PIERCE, Chairman
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

AZ CORP COMMISSION
DOCKET CONTROL

DOCKETED BY

IM

In the matter of:

THOMAS LAURENCE HAMPTON,
CRD#2470192, and STEPHANIE YAGER,
husband and wife,

TIMOTHY D. MORAN, CRD#2326078, and
PATRICIA MORAN, husband and wife,

PATRICK MORAN, CRD#1496354, and
KELLY MORAN, husband and wife,

HAMPTON CAPITAL MARKETS, LLC, an
Arizona limited liability company,

Respondents

DOCKET NO. S-20823A-11-0407

**SECURITIES DIVISION'S RESPONSE
TO TIMOTHY D. MORAN AND
PATRICIA MORAN'S MOTION TO
DISMISS**

**(Assigned to Administrative Law Judge
Marc E. Stern)**

A. SUMMARY

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") responds to Timothy and Patricia Moran's Motion to Dismiss and requests that it be denied because the Division has met its notice pleading burden under the statutes and rules applicable to this proceeding. The Division's Notice of Opportunity for a Hearing Regarding Proposed Order to Cease and Desist, Order of Restitution, Order of Administrative Penalties, Order of Revocation, and Order for Other Affirmative Action ("Notice") alleges that Respondent Timothy D. Moran ("Tim") offered and sold unregistered securities regarding Hampton Capital Markets, between the approximate periods of August 2010 to October 2011 and that Respondent Tim received approximately \$319,857 as commissions or fees. The requirement of the notice

1 pleading standard, that the Division notify the opposing party of the nature of the claim, has been
2 satisfied.

3 In addition, a dismissal with prejudice as requested by Respondent is extraordinary and
4 improper under the circumstances and should be denied.

5 Finally, Respondent Tim's registration as a securities salesman is still subject to revocation
6 or suspension by the Commission pursuant to A.R.S. § 44-1963(D), up to two years after the
7 termination or the lapse of an individual's securities salesman registration.

8 **B. ARGUMENT.**

9 **1. THE RULES OF PRACTICE AND PROCEDURE BEFORE THE CORPORATION**
10 **COMMISSION ONLY REQUIRES THAT A NOTICE NOTIFY THE**
11 **RESPONDENTS OF THE NATURE OF THE CLAIM, WHICH THE DIVISION**
HAS DONE.

12 Respondent Tim appears to argue that because the Division's Notice did not state with
13 additional specificity each and every offer or sale Respondent Tim is alleged to have made, it is
14 thus vague because it does not demonstrate that the Division is entitled to relief against
15 Respondent Tim, and should be dismissed for failure to state a claim. The Division disagrees.

16 First, this is an administrative case filed before the Commission alleging violations of Title
17 44. Thus, the procedures governing the Division's investigations, examinations, and
18 administrative proceedings are found under the Arizona Administrative Code ("A.A.C.") and
19 chapters 3 and 4 of the A.A.C.¹ Rule R14-3-101(A) of the A.A.C. states the Commission Rules of
20 Practice and Procedure govern in all cases before the Corporation Commission, including cases
21 arising out of Title 44. Here, A.A.C. R14-4-306 applies to Division notices regarding hearings.

22 A.A.C. R14-4-306 is a notice pleading rule and as a result, all that is required is that the
23 Division notify the opposing party of the nature of the claim. This is entirely consistent with §41-

24
25 ¹ If Title 14, Chapter 4 of the A.A.C. were for some reason deemed insufficient, Title 14, Chapter 3 of the
26 A.A.C. also contains procedures regarding administrative proceedings before the Commission. If the
A.A.C. were deemed insufficient, the Arizona Administrative Procedure Act ("AAPA") would apply
since this proceeding involves a contested case as that term is defined under §41-1001(4) of the AAPA,
which contains a statute governing a notice pleading pursuant to §41-1061(B)(4).

1 1061(B)(4) of the AAPA which states that a notice shall include “[a] short and plain statement of
 2 the matters asserted. If the agency or other party is unable to state the matters in detail at the time
 3 the notice is served, the initial notice may be limited to a statement of the issues involved.” The
 4 Division’s Notice does this. As Respondent acknowledged in his motion, the Notice alleged that
 5 Respondents offered and sold securities. More specifically, the Notice alleged that Respondents,
 6 which includes Tim, offered and sold passive investments to the general public to raise a pool of
 7 capital to fund Thomas Hampton’s ETF trading business (i.e. the Hedge Fund Investments).
 8 Division Notice p.5, ¶ 24. The Notice also stated that the offers and sales occurred between the
 9 periods of August 2010 to October 2011 and that Respondent Tim received approximately
 10 \$319,857 as commissions or fees. *Id* at ¶¶ 24, 69, and 73. The Notice further alleged that the
 11 unregistered securities were in the form of investment contracts and offered or sold within or from
 12 Arizona, in violation of A.R.S. § 44-1841. *Id* at ¶ 73.

13 There is no requirement under any Commission rule or statute that the Notice identify each
 14 and every specific offer or sale, the victim, the date, time, or the location of each offer or sale,
 15 made by a specific respondent.² In addition, two A.A.C. Rules provide additional guidance.
 16 A.A.C. R14-3-101(B) states the A.A.C. “shall be liberally construed to secure the just and speedy
 17 determination of all matters presented to the Commission.” A.A.C. R14-3-106(E) states “formal
 18 documents will be liberally construed and defects which do not affect substantial rights of the
 19 parties will be disregarded.” To require the Division to detail each and every offer or sale by a
 20

21 ² Though ARCP Rule 8 does not apply, it should be noted that Rule 8 also does not require such specificity.
 22 Rule 8(a) sets forth:

23 A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim,
 24 or third-party claim, shall contain:

25 1. A short and plain statement of the grounds upon which the court's jurisdiction depends, unless the
 26 court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it.

2. A short and plain statement of the claim showing that the pleader is entitled to relief.

3. A demand for judgment for the relief the pleader seeks. Relief in the alternative or of several
 different types may be demanded.

1 Respondent would be beyond the clear requirement of the A.A.C., the AAPA, and would not
2 contribute to the just and speedy determination of the matters presented to the Commission.

3 Respondent knows that the nature and basis of the claims against him revolve around
4 alleged offers and sales of unregistered securities that occurred approximately between the periods
5 of August 2010 to October 2011 and that Respondent Tim received approximately \$319,857 as
6 commissions or fees from such sales and introductions. Thus, the Notice's short and plain
7 allegations more than adequately informs Respondent of what conduct the Division alleges
8 violates the Arizona Securities Act ("Securities Act").

9 **2. A MOTION TO DISMISS WITH PREJUDICE IS NOT APPROPRIATE AND**
10 **SHOULD BE DENIED.**

11 Respondents seek an extraordinary and improper remedy of a dismissal *with* prejudice,
12 which should be denied. Respondent Tim argues that the use of the term "Respondents" prohibits
13 him from understanding the basis of the claims against each respondent.

14 Though the Notice does include certain allegations that are applicable to multiple
15 respondents, it is still sufficient to provide notice to each individual Respondent and a basis for
16 each relief claimed. For example, all respondents are alleged to have violated A.R.S. § 44-1841,
17 but only three respondents, each specifically named, are alleged to have violated § 44-1842, and
18 only two respondents, each specifically named, are alleged to have violated § 44-1991. The
19 additional facts alleged against Respondent Tim, that he offered and sold unregistered securities,
20 i.e. the Hedge Fund Investments, within or from Arizona between the periods of August 2010 to
21 October 2011, introduced additional clients who invested, and received commissions or fees, are all
22 applicable to him too. Thus, the Notice distinguishes the acts of the respondents and the relief
23 sought against each respondent, respectively. Further, a violation of A.R.S. § 44-1841 provides a
24 basis for all relief requested by the Division in its Notice, including but not limited to, restitution,
25 penalties, and revocation of Respondent's registration as a securities salesman. Therefore,
26 Respondents motion to dismiss should be denied.

1 The Division agrees with Respondent Tim that the Notice currently does not contain any
2 direct facts or allegations that Respondent Tim violated A.R.S. § 44-1991 and the reference to it
3 can be amended or deleted in the single instance. The only instance that A.R.S. § 44-1991 is
4 mentioned as it relates to Respondent Tim is in sub-paragraph 80(a) of the Division's Notice,
5 which can be amended to state "Violated A.R.S. § 44-1962(2) by violating Title 44, Chapter 12,
6 including A.R.S. §§ 44-1841, 44-1842, or 44-1991." The Division's Notice contained a
7 typographical error that contained "and" instead of "or." As noted above, pursuant to A.A.C. R14-
8 3-106(E) "defects which do not affect substantial rights of the parties will be disregarded." The
9 basis for the Division's relief is a violation of A.R.S. § 44-1841, which Respondent understands is
10 the nature and basis of the Division's claims against him, and the typo does not affect Respondent
11 Tim's substantial rights.

12 Finally, a dismissal with prejudice is extraordinary. Rather, the ALJ, pursuant to A.A.C.
13 R14-3-106(E), can order the Division to amend its Notice to add additional allegations if the ALJ
14 were to determine that the Division's current series of allegations should be amended or
15 supplemented. The Division is prepared to file an amended Notice that contains a revision to sub-
16 paragraph 80(a) of the Division's Notice and that alleges, among other things, that Respondent Tim
17 contacted certain Arizona residents and offered the HCM Investments to them. In addition, the
18 Division is prepared to include that Respondent Tim also stated to at least one investor that he "had
19 found gold" when describing the HCM Investment. These additional facts can further supplement
20 the various allegations already put forth against Respondent Tim and further reiterates that the
21 Division has alleged Respondent Tim violated provisions of the Securities Act and can be granted
22 its requested relief as a result.

23 **3. A.R.S. § 44-1963(D) ALLOWS THE DIVISION TO SUSPEND OR REVOKE**
24 **RESPONDENT TIM'S REGISTRATION AS A SECURITIES SALESMAN.**

25 Respondent argues that the Division is without power to revoke Respondent's registration
26 as a securities salesman because he is not currently "registered." It appears that Respondent's
counsel believes that registration as a securities salesman was revoked by the Commission when

1 the Respondent was terminated in December 2011 by his Broker/Dealer FSC Securities
2 Corporation. This is incorrect because it confuses the requirement that the Respondent be
3 associated with a Broker/Dealer to offer and sale securities with the fact that he could become re-
4 employed by another Broker/Dealer firm prior to the expiration of his securities registration. Being
5 terminated by an employing Broker or Dealer firm does not mean the person's registration with the
6 Commission has been revoked. A.R.S. § 44-1963(D) recognizes this and states that:

7 A dealer or salesman that has voluntarily terminated or allowed the dealer's or
8 salesman's registration to lapse continues to be subject to actions by the commission
9 under this article in connection with conduct that began before the termination or
10 lapse of the registration. The commission shall begin any action under this article
against the dealer or salesman within two years after the termination or lapse of the
registration.

11 Thus, the Commission's ability to revoke or suspend a person's securities registration extends up to
12 two years after the termination or lapse of the registration. This action against Respondent began
13 when it filed on July 12, 2012, which is within the timeframe stated for A.R.S. § 44-1963(D).
14 Thus, Respondents registration as a securities salesman is still subject to revocation or suspension.

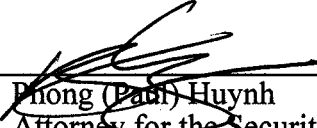
15 **C. CONCLUSION.**

16 Based on the foregoing, the Division respectfully requests that Respondents' Motion to
17 Dismiss be denied because the Notice satisfies the notice pleading requirements of the A.A.C. and
18 AAPA. Alternatively, if additional facts are requested by the ALJ, an order requiring the Division
19 to file an amended notice should be made and the Division will promptly comply with additional
20 allegations or amendments against Respondent Tim, as appropriate.

21
22 RESPECTFULLY SUBMITTED this 17th day of September, 2012.

23 ARIZONA CORPORATION COMMISSION

24
25 By _____

26 
Phong (Paul) Huynh
Attorney for the Securities Division of the
Arizona Corporation Commission

1 ORIGINAL AND EIGHT (8) COPIES of the foregoing
2 filed this 17th day of September, 2012 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington St.
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered
8 this 17th day of September, 2012 to:

9 Mr. Marc E. Stern
10 Administrative Law Judge
11 Arizona Corporation Commission/Hearing Division
12 1200 W. Washington St.
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed
15 this 17th day of September, 2012 to:

16 Thomas Hampton and Hampton Capital Markets, LLC
17 9026 E. Calle De Las Brisas
18 Scottsdale, AZ 85255

19 Stephanie Yager
20 9026 E. Calle De Las Brisas
21 Scottsdale, AZ 85255

22 Timothy J. Sabo
23 Roshka DeWulf & Patten, PLC
24 One Arizona Center
25 400 East Van Buren, Suite 800
26 Phoenix, AZ 85004
Attorney for Timothy and Patricia Moran

Michael D. Curran
3200 North Central Avenue
Suite 1800
Phoenix, Arizona 85012
Attorneys for Patrick and Kelly Moran

By: 